

EDMUND G. BROWN JR.  
Attorney General of the State of California  
JAMES HUMES  
Chief Deputy Attorney General  
JANET GAARD  
Chief Assistant Attorney General  
THEODORA BERGER  
Senior Assistant Attorney General  
KEN ALEX  
Supervising Deputy Attorney General  
SANDRA GOLDBERG (SBN 138632)  
LAURA J. ZUCKERMAN (SBN 161896)  
Deputy Attorneys General  
1515 Clay Street, 20th Floor  
Oakland, CA 94612  
Telephone: (510) 622-2174  
Fax: (510) 622-2270  
[laura.zuckerman@doj.ca.gov](mailto:laura.zuckerman@doj.ca.gov)

Attorneys for People of the State of California *ex rel.*  
Edmund G. Brown Jr., Attorney General of the State  
of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

**PEOPLE OF THE STATE OF CALIFORNIA  
*ex rel.* EDMUND G. BROWN JR.,  
ATTORNEY GENERAL OF THE STATE OF  
CALIFORNIA.**

**Plaintiff,**

V.

## **ENVIRONMENTAL PROTECTION AGENCY.**

Defendant.

Case No.: C 08-00735 SC

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF'S MOTION FOR  
VAUGHN INDEX**

Date: April 25, 2008  
Time: 10:00 a.m.  
Place: Courtroom 1, 17th Floor  
Judge: Hon. Samuel Conti

In compliance with N.D. Local Rule 7-4(a), plaintiff People of the State of California, by and through Edmund G. Brown Jr., Attorney General of the State of California, submits this Memorandum of Points and Authorities in Support of Plaintiff's Motion for a *Vaughn* Index

111

1     **I.       INTRODUCTION**

2       Plaintiff filed this case to compel the Environmental Protection Agency (“EPA”) to respond  
3 to the People of the State of California’s request for records under the Freedom of Information  
4 Act, 5 U.S.C. §552, *as amended* (“FOIA”). Under FOIA, to justify withholding information  
5 once litigation has begun, an agency may be required to produce a “*Vaughn*” index, which  
6 correlates withheld documents or withheld portions of documents with detailed justifications for  
7 their withholding. It is proper for the Court to order defendant to produce and submit a *Vaughn*  
8 index promptly.

9     **II.      BACKGROUND**

10      In December 2005, the California Air Resources Board (“CARB”) requested from EPA a  
11 waiver of preemption under section 209(b) of the Clean Air Act, 42 U.S.C. § 7543(b), for  
12 CARB’s regulations to control greenhouse gas emissions from new motor vehicles (“GHG  
13 Regulations”), adopted in 2005 to implement the Pavley law (Assembly Bill 1493). The Clean  
14 Air Act gives California express authority to set its own emission standards provided it receives  
15 a waiver of preemption from EPA. The GHG Regulations are the most significant regulations  
16 currently in existence anywhere in the nation to address global warming, and at least twelve  
17 states would have been free to implement the same regulations if California had received the  
18 EPA waiver.

19      Despite demonstration of the severe effects of global warming on California’s population,  
20 economy, and environment, EPA failed to take action on the waiver request for two years. On  
21 December 19, 2007, EPA Administrator Stephen Johnson rejected California’s request to  
22 implement regulations on tailpipe emissions of greenhouses gases, principally carbon dioxide.  
23 The decision represents the first time EPA has denied a request by California to impose its own  
24 pollution rules: it previously has granted the state approximately 50 waivers.

25      On December 27, 2007, plaintiff sent a FOIA request to EPA seeking the disclosure of  
26 records related to the waiver denial, “including communications within and outside the federal  
27 government related to the waiver request, drafts of the decision document, analyses comparing  
28 emission reductions, fuel savings, or fuel economy increases that could result from

1 implementation of the GHG Regulations to those that could result from implementation of  
 2 federal legislation, and briefing materials related to the waiver request that were prepared for the  
 3 Administrator or senior staff of EPA, including, but not limited to, the PowerPoint presentation  
 4 referenced in the December 20, 2007 Washington Post article entitled ‘EPA Chief Denies Calif.  
 5 Limit on Auto Emissions.’’’ Complaint filed January 31, 2008 (“Complaint”), ¶ 7 and Ex. B; *see*  
 6 Answer filed March 3, 2008 (“Answer”), ¶ 7. EPA failed to produce any responsive records  
 7 prior to the filing of the Complaint. Complaint, ¶ 9; Answer, ¶ 9. To date, EPA has failed to  
 8 respond to the request or to provide an index to the documents withheld. Zuckerman Decl., ¶ 2.

9 Defendant’s failure to date to provide a detailed justification of the basis for the exemptions  
 10 claimed, whether by index or otherwise – or indeed to respond to the request *at all* – prompted  
 11 the filing of this motion.

12 **III. ARGUMENT**

13 The Freedom of Information Act requires that government agencies shall, on receipt of a  
 14 proper request, promptly disclose their records unless those records are subject to withholding  
 15 pursuant to one of FOIA’s exemptions. The agency must respond to the request within 20  
 16 working days. 5 U.S.C. 552(a)(6)(A)(i). Once litigation has begun, a court may require an  
 17 agency to submit an index correlating the documents or portions of documents withheld with  
 18 detailed justifications for their withholding. *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C.Cir.  
 19 1973), *cert. denied*, 415 U.S. 977 (1974); *see also, e.g.*, *Lion Raisins Inc. v. U.S. Dep’t of*  
 20 *Agriculture*, 354 F.3d 1072, 1082 (9th Cir. 2004).

21 Since *Vaughn* was decided, “government agencies seeking to withhold documents requested  
 22 under the FOIA have been required to supply the opposing party and the court with a ‘*Vaughn*  
 23 index,’ identifying each document withheld, the statutory exemption claimed, and the  
 24 particularized explanation of how disclosure of the particular document would damage the  
 25 interest protected by the claimed exemption.” *Wiener v. Federal Bureau of Investigation*, 943  
 26 F.2d 972, 977 & n.4 (9th Cir. 1991) (citations omitted), *cert. denied*, 505 U.S. 1212 (1992); *see*  
 27 *also, e.g.*, *Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State*, 818 F.  
 28 Supp. 1291, 1295 (N.D. Cal. 1992). “The purpose of the index is to afford the FOIA requester a

1 meaningful opportunity to contest, and the district court an adequate foundation to review, the  
2 soundness of the withholding.” *Wiener*, 943 F.2d at 977 (citations and internal quotation marks  
3 omitted). It is one method (like submission of another form of accounting for the withheld  
4 documents, such as an affidavit) of ensuring that the requesting party and the deciding judge  
5 have enough information to determine whether the government agency properly withheld the  
6 documents sought. *Schiffer v. Federal Bureau of Investigation*, 78 F.3d 1405, 1408-09 (9th Cir.  
7 1996).

8 Just as important as the production of a *Vaughn* index, however, is its production in a timely  
9 fashion. Production of an index at the outset of the litigation will allow time for the plaintiff to  
10 litigate the adequacy of the index if necessary, and it should enable the parties to narrow the  
11 scope of the issues to be resolved on their cross-motions for summary judgment. Plaintiff has  
12 requested that defendant provide such an index, but to date EPA has not agreed. Zuckerman  
13 Decl., ¶ 3. It is proper for the Court to order such an index be prepared and filed promptly, given  
14 FOIA’s policy of expedited handling of document requests. *See, e.g., Coastal States Gas Corp.*  
15 *v. Department of Energy*, 644 F.2d 969, 972 (3d Cir. 1981).

16 **IV. CONCLUSION**

17 Plaintiff made its FOIA request to EPA over 2 ½ months ago. Plaintiff requests that the  
18 Court grant this Motion for a *Vaughn* Index, and order defendant to file such an index, and  
19 produce all documents not subject to a valid claim of exemption, no later than 14 days from the  
20

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 date of the Court's order.

2 Dated: March 21, 2008

Respectfully submitted,

3 EDMUND G. BROWN JR.  
4 Attorney General of the State of California  
5 JAMES HUMES  
6 Chief Deputy Attorney General  
7 JANET GAARD  
8 Chief Assistant Attorney General  
9 THEODORA BERGER  
10 Senior Assistant Attorney General  
11 KEN ALEX  
12 Supervising Deputy Attorney General  
13 SANDRA GOLDBERG  
14 Deputy Attorney General

15 /S/ LAURA J. ZUCKERMAN

16 LAURA J. ZUCKERMAN  
17 Deputy Attorney General

18 Attorneys for People of the State of California  
19 *ex rel.* Edmund G. Brown Jr., Attorney  
20 General of the State of California

21  
22  
23  
24  
25  
26  
27  
28